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November 20, 2009

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW.
Washington, DC 20551

RE: Docket No. R–1370

Dear Ms. Johnson:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions (FCUs), I am responding to the Federal Reserve Board's proposed rule implementing the provisions of the *Credit Card Accountability, Responsibility and Disclosure Act* (CARD Act) that go in to effect on February 22, 2010.

While NAFCU generally supports the intent behind the CARD Act, we are concerned with several aspects of the proposed rule. Some credit card issuers have engaged in a number of questionable practices over the years. NAFCU agrees with Congress and the Federal Reserve Board that some of these practices need to be curtailed. However, in targeting the worst actors and the most predatory practices, NAFCU believes the CARD Act and this proposed rule are unnecessarily broad. Consequently, while the rule will help bring an end to the most egregious practices, significant costs will be borne by the entire industry, including those who have been responsible lenders. All of the changes to the Truth in Lending Act (TILA) and Regulation Z will undoubtedly cause the consumer credit market to tighten up while simultaneously driving up the cost of credit for those who still qualify. In many cases those costs will not be counterbalanced by significant benefits for credit union members.

General Disclosure Requirements

NAFCU generally supports the facts and circumstances test included in § 226.5(b)(1)(i)-6 to help distinguish between a change in an existing account and the opening of a new account. However, the test provides six questions to use to guide the analysis. The official staff interpretation states, "when most of the facts and circumstances…are present, the substitution or replacement likely constitutes the opening of a new account…." 74 Fed. Reg. 54124, 54272 (October 21, 2009) (to be codified at 12 C.F.R. pt. 226). Consequently, it is unclear if three out of the six questions are answered affirmatively, whether a new account has been opened. In short, the test would provide a better bright line if it had five or seven questions. With that in mind, NAFCU recommends removing the question regarding whether the issuer provides a new account number. In many cases, a new account number may be issued as an extension of an existing account. For example, in cases of identity theft or fraud a new account number is always issued even if there are no changes to the account. Conversely, a member asking for significant changes to the account terms may specifically request to keep the same account number in order to ensure that are no problems with reoccurring bills that are automatically charged to the existing account. The rest of the questions in the facts and circumstances test are reasonably good proxies to help determine whether a new account has been opened. The question regarding account numbers, however, is not useful in helping answer that question.

Periodic Statements

NAFCU urges the Board to include an exception in § 226.7(b)(11) which requires the due date to be on the same day of the month for each billing cycle. This rule would effectively make it impossible to have a due date on the 29th, 30th or 31st of any month. While well intentioned, a blanket application of this rule will create an undue burden for credit unions and their members without necessarily providing any tangible benefits. Effectively, the rule will require issuers to either move due dates forward to the 28th or back to the first of each month. Moving the due date forward in many cases will harm consumers as they may have picked a due date at the end of the month to coincide with their payday.

With the above concerns in mind, NAFCU urges the Board to provide an exception for institutions that do not charge a late fee until a payment is more than 15 days past due. This exception would allow credit unions to continue honoring members' requests to be billed at the end of each month. The exception would not undercut consumer protection as it would only apply in cases where the card issuer allows payments to be 15 days past due before applying a late fee. Finally, it would eliminate the time and cost required to make the changes necessary to move due dates forward or backward.

Subsequent Disclosure Requirements

*Employee Rate Reductions*

NAFCU is also concerned that the new rules may have an unintended negative impact on consumers who benefit from employee rate reductions. Currently, many credit unions offer employees a slightly lower annual percentage rate (APR) than they would otherwise qualify for, as a benefit of employment. Typically, that benefit expires if the employee quits working for the credit union. The employee discount rate is usually included either in the loan agreement itself or as a supplemental agreement. Further, the agreement specifies that the rate discount will discontinue upon the employee leaving the credit union. The proposed rule does not include any exceptions that would allow the credit union to increase the APR upon receiving an employee's resignation. Consequently, credit unions would likely abandon this practice. Accordingly, NAFCU requests that the Federal Reserve consider addressing this issue in the final rule.

Under the proposed rule, § 226.9(c)(2)(v)(B), states that advance notice is not required "[w]hen the change is an increase in an annual percentage rate upon the expiration of a specified period of time…." Id. at 54217. Accordingly, NAFCU recommends the Board consider including a comment in the official staff interpretation stating that "For employees of financial institutions, an agreement for a discounted APR during the period of time of the employee's employment with the financial institution is considered a specified period of time." In short, credit unions need some sort of clarification that the benefit may end when the employee terminates employment. If some sort of exception or clarification is not included, credit unions will most likely discontinue this benefit. NAFCU believes it was not the intent of Congress to eliminate employee benefits such as this. In fact, the existing staff commentary includes similar clarifications regarding employee discounts for other open-end loans and home equity plans. 12 C.F.R. 226.9(c)-1. NAFCU urges the Board to consider including a similar exception for employee discounts on credit card accounts.

*Variable Rate Exception*

The proposed rule creates an exception from the 45 day notice requirement if the credit card account has a variable rate APR which has previously been disclosed to the card holder. NAFCU requests that the Board consider clarifying that temporarily forgoing an increase in a variable rate APR will not make it permanently impossible to apply the higher rate in the future. For example, a credit union may have a five percent margin over the prime rate of five percent for a total APR of ten percent. In some cases, after the prime rate rises to six percent, the credit union may continue to charge ten percent, though it would be entitled to charge eleven percent. Clearly any delay in raising the rate benefits the consumer. The proposed rule is silent as to the effects of any temporary delay in increasing the APR. Consequently, NAFCU supports clarifying that temporarily forgoing an increase in APR will not make it permanently impossible to increase the rate.

*Delinquency or Default or as a Penalty*

The portion of the rule regarding penalties for delinquency would benefit from clarification. Under the proposed rule, a card issuer may apply a penalty rate if a card holder is more than 60 days late. Proposed § 226.9(g) directs card issuers to disclose to consumers "[t]hat the increase will cease to apply if the creditor receives six consecutive required minimum payments on or before the payment due date, beginning with the first payment due following the effective date of the increase." Id. at 54218. The proposed language, however, is ambiguous as to whether the consumer must actually cure the default. In this situation, the next payment due following the effective date of the increase would likely include three months worth of minimum payments (the two payments that are already past due, plus the current payment). If the Board interprets the rule to allow the card issuer to continue rolling over any past due payments in to the next month's minimum payment there would be no issue. However, NAFCU is concerned that the proposed rule could be read to require the consumer to simply continue making the standard minimum payment over the next six months. NAFCU believes the card holder should be required to cure the default *and* make six consecutive, timely payments. The proposal, however, is ambiguous as to whether the default must be cured. NAFCU supports clarifying this issue by authorizing card issuers to roll over previous past due payments into the next payment cycle's minimum payment.

Payments

NAFCU recommends two clarifications regarding crediting payments. The proposed official staff interpretation, 226.10(a)-2.iv states that "[p]ayment made via a creditor's Web site is received on the date on which the consumer authorizes the creditor to effect payment, even if the consumer gives the instruction authorizing the payment in advance of the date on which the creditor is authorized to effect the payment." Id. at 54297. It is unclear if the date of receipt would be the date the consumer authorized the transaction or the date on which the creditor is asked to effect the payment. NAFCU believes the latter interpretation should be adopted. Accordingly, we request the final rule clarify this matter.

Next, proposed official staff interpretation, 226.10(b)-2 requires all payments made via a creditor's web site to be considered as confirming payments. This, however, may be difficult for smaller credit unions, many of which use third party processors to assist in online payments. For credit unions that use a third party vendor it is difficult to immediately discern if the payment is conforming. Consequently, NAFCU request that the Board consider clarifying that institutions that use third party processors may determine the payment date in accordance with proposed 226.10(a)-2.iii, which governs payments using third parties. Id. Such a clarification would be very helpful for smaller institutions that must rely on third parties for payment processing.

Requirements for Over-the-Limit Transactions

NAFCU requests that the Board consider including an exception to the strict prohibition on fees for transactions that exceed the credit limit. Specifically, there should be an exemption for transactions that are approved based on a reasonable belief that the transaction would not exceed the customer's credit limit. This issue is particularly problematic as it relates to transactions at self-serve gas pumps and restaurants. When a consumer uses his or her card to purchase gasoline, the merchant generally seeks approval for a nominal sum in order to ensure the account is valid. For example, a gas station may seek approval of just $1, however, the customer may then pump $50 worth of gas, pushing his account over the limit. Likewise, restaurants generally seek approval for the amount of the bill. When the transaction is presented for payment, however, the gratuity may cause the consumer to exceed the credit limit. The card issuer, however, is required by the operating rules with the card companies to honor these transactions. In instances such as this, NAFCU believes the card issuer should be allowed to charge a nominal fee, even if the cardholder has not opted to have over-the-limit transactions covered.

Special Rules for Marketing Open-End Credit to College Students

NAFCU is concerned with two aspects of the proposed rule relating to marketing cards to college students. First the prohibition on marketing cards to students near a college campus is unnecessarily complex. Second, the prohibition on marketing cards "at an event sponsored by or related to an institution of higher learning" (Id. at 54228) is particularly burdensome for credit unions whose sponsor is the institution of higher learning.

The official staff interpretation defines "at or near a college campus" as within 1,000 feet of a campus as defined by the institution of higher learning. Id. at 54328. Further, the prohibition extends to mailing any item to a student who lives within 1,000 feet of a campus. Id. This is problematic for two reasons. First, the proposal gives the college or university the authority to determine the parameters of its campus. However, there is no guidance as to how the university may make that determination, nor is there any corresponding notice mechanism included in the proposal. A university could quite plausibly use an expansive definition and include any space it owns, leases or operates as part of the campus. Card issuers would then be prohibited from offering or mailing any giveaway to any student within a 1,000 foot radius of any such space, even though it may be entirely unclear where the boundary ends. Second, the rule would be incredibly difficult to comply with for any branch office located in an urban area simply because, under the proposed rule, it would be difficult for employees to know if their branch is within 1,000 feet of a campus. This is made all the more difficult by the fact that the institution of higher education has the authority to determine what constitutes its campus. NAFCU recommends eliminating the comment in the official staff interpretation that effectively prohibits giveaways within 1,000 feet of a college campus. Instead, giveaways should be prohibited only on the campus. Additionally, at the very least, the final rule must include some sort of notice mechanism that informs card issuers of how each institution has defined its parameters.

NAFCU is also concerned with the official staff interpretation regarding giveaways at events sponsored by or related to an in institution of higher learning. The staff interpretation defines this term broadly, stating,

> "[A]n event is related to an institution of higher education if the marketing of such event uses the name, emblem, mascot, or logo of an institution of higher education, or other words, pictures, symbols identified with an institution of higher education in a way that implies that the institution of higher education endorses or otherwise sponsors the event." Id.

This prohibition is particularly bothersome for credit unions that are sponsored by a college or university. In many cases, the name of the credit union itself or its logos may be similar to those of the institution of higher learning and consequently, under the proposal, may imply the institution has endorsed or otherwise sponsored the event. NAFCU recommends the Board add additional comments clarifying that an event would not fall within the definition above by virtue of being held by a credit union whose name or logos are similar to that of its college or university sponsor.

In conclusion, while NAFCU supports the premise behind the CARD Act, we believe the proposed rule implementing the Act would benefit from the changes detailed above. NAFCU appreciates this opportunity to share its comments on the proposed guidelines. Should you have any questions or require additional information please call me at (703) 842-2212.

Sincerely,

Dillon Shea

Dillon Shea
Associate Director of Regulatory Affairs